TAKONG TABARI @ TAKUNG TABARI

v.

GOVERNMENT OF SARAWAK & ORS. & 2 OTHER CASES

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[SUIT NO. MR 5 OF 1993]
17 OCTOBER 1995

TORT: *Negligence - Duty of care - Injury and death from explosion caused by leakage of gas - Gas supplied to premises although not applied for - Whether there was duty to ensure that only accredited gas consumers are supplied - Duty to ensure safety after installation - Whether duty of care breached - Whether consequential damage foreseeable - Apportionment of liability.*

TORT: *Occupier's liability - Duty of care to invitee - Bank and customer - Whether duty of care owed - Nature of the duty - Unusual danger - Onus of proof - Vicarious liability.*

TORT: *Vicarious liability - Employer and employee - Bank and staff - Negligence - Whether bank liable for staff's omission.*

TORT: *Nuisance - Public nuisance - Principles and proof - Whether knowledge an essential element - Continuance.*

TORT: *Volenti non fit injuria - Necessary elements - Voluntariness - Full knowledge of nature of risk - Consent to risk - Nature of consent.*

DAMAGES: *Fatal accident - Civil Law Act 1956, ss. 7 & 8 - Appropriate multiplier - Loss of dependency - Calculations on gross monthly earnings of deceased – Whether to include annual bonus entitlement - Average monthly income and tax payable - Whether amendments to Act bar deceased's estate from claiming damages for pain and suffering.*

The two actions herein were heard together as they arose from the same incident and involved common parties. The plaintiff in the first action ('the 1st plaintiff') sued in her personal capacity and as the administratrix of the deceased's estate. She claimed the following: (1) damages under s. 7 of the Civil Law Act 1956 ('the CLA') for the deceased's dependants; (2) damages under s. 8 of the CLA for the deceased's estate; (3) interest on the damages claimed; (4) further or other relief; and (5) costs.

The plaintiff in the second action ('the 2nd plaintiff') sued in his personal capacity and prayed for relief similar to those prayed for by the 1st plaintiff. The defendants in the second action brought in three third-parties, ie, Perunding Dayacipta ('Perunding'); the Director of the Public Works Department,

Sarawak ('the Director'); and the Government of Sarawak ('the Government') which was the first defendant in the first action.

The plaintiffs alleged liability on the basis of the escape of gas being a dangerous thing, negligence, occupier's liability, and public nuisance. The undisputed facts of the case were, *inter alia*, that: (1) there was an explosion and fire in the premises occupied by Public Bank Bhd ('PBB'), the fourth and third defendant in the first and second actions respectively; (2) the premises were registered in the names of the second defendant ('Liew') and the third defendant ('Phua') in the first action (the first and second defendants in the second action); (3) Liew and Phua had subleased the said premises to PBB; (4) Perunding had renovated the premises but gas supply was not part of the renovation; (5) gas supply in Miri was under the care and management of the Government through the Public Works Department, Sarawak ('the PWD'); (6) the premises was connected to the gas metering system although it was not in the list of accredited gas consumers; (7) the readings of the gas meter had indicated a high usage of gas; (8) the deceased was in the premises on official business when he was seriously injured in the said explosion, and that he later succumbed to his injuries; and (9) the 2nd plaintiff was in the premises on official business when the explosion occurred.

Before the Court, the question of liability was answered on the basis of the following issues: (1) what was the cause of the explosion and fire in the premises; (2) was there any negligence involved; (3) other basis of claim; and (4) the specific defences pleaded.

Held:

[1] The explosion and fire was due to the ignition of an inflammable mixture of gas and air in the premises, the gas having leaked into the premises from the natural gas supplied by the Government through the PWD.

[2] Indisputably, the premises was not in the list of accredited gas consumers. Gas supply was never applied for the premises but it was still supplied thereto. Thus, the PWD had failed to take or took insufficient precautions to ensure that only accredited gas consumers were connected for gas supply. The PWD was duty-bound to ensure that only those in the list or those who had applied for gas would be supplied with it. There was, therefore, an obvious breach of duty on the part of the PWD.

[3] After installing the gas meter and connecting the premises for gas supply, which should not have happened in the first place, the Government, through the PWD, had failed to take or took insufficient steps to ensure the safety of the premises. The PWD and the Government had a major role in causing the accident through their acts and omissions. The PWD had a duty to take care and it breached that duty. It was also reasonably foreseeable that consequential damage could result.

[4] Liew had no part in bringing or allowing the supply of gas into the premises. Thus, he had no part in causing the explosion and fire in the premises. Similarly, no blame should be attached to Perunding as there was no evidence that it had failed to carry out the renovation properly or that it meddled with the gas pipes in the premises.

[5] Under the English common law which applies in Malaysia, an occupier is under a duty to prevent damage or injury to an invitee or visitor from any unusual dangers on the premises which he knows, or ought to know, and which the invitee or visitor does not know about. The onus of pleading and proving 'unusual danger which the occupier knew or ought to have known' rests on the invitee. An 'unusual risk' is one which is not usually found in carrying out the task which the invitee has in hand.

[6] PBB could not be held responsible for allowing the supply of gas into the premises. However, PBB, through its staff, had failed to take the necessary steps after becoming aware of the unfamiliar smell in the premises. The omission on the part of PBB, through its staff, to a certain degree, led to the accident. It was reasonably foreseeable that customers and members of the public having dealings with PBB would be in the premises during banking hours. As such, PBB owed a duty of care and should have taken all reasonable precautions to ensure their safety whilst in the premises. As a result of its staff's omission, PBB should be held vicariously responsible for the breach of that duty.

[7] In respect of the escape of gas being a dangerous thing, the plaintiffs had failed to show that it was the defendants who collected and kept the dangerous thing, or that they had knowingly (or ought to have known) allowed gas to escape.

[8] There was no evidence that the defendants had created or continued a public nuisance. An occupier is not prima facie responsible for a nuisance created without his knowledge and consent. To be liable, a further condition is necessary, *viz,* that he had knowledge, or means of knowledge, that he knew, or should have known, of the nuisance in time to correct it and obviate its mischievous effects. The responsibility which attaches to the occupier through his possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the management of his property, he should have realised the risk of its existence. If the defendant did not create the nuisance, he must, if he is to be held responsible, have continued it, which means he neglected to remedy it when he became, or should have become, aware of it.

[9] PBB had failed to establish the defence of *volenti non fit injuria* as it could not prove that the plaintiffs had voluntarily and freely, with full knowledge of the nature of the risk they ran, impliedly agreed to incur it.

[10] If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage.

[11] In computing the appropriate multiplicand for general damages for loss of dependency under s. 7(iv) (d) of the CLA, the calculations on the gross monthly earnings of the deceased must include his annual bonus entitlement. However, his average monthly income must take into account the tax payable.

[12] The amendments to the CLA did not alter the right of the estate of a deceased person to claim damages for pain and suffering in the event that death was not instantaneous and the deceased was conscious prior to his death.

[Judgment for plaintiffs. Order accordingly]

Cases referred to:
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Caswell v. Powell, Etc. Collieries Ltd. [1939] 3 All ER 722 ***(refd)***
Page v. Smith [1995] 2 All ER 736 ***(refd)***
Dominion Natural Gas Co. v. Collins [1908-10] ALL ER 61 ***(cit)***
Indermaur v. Dames [1886] LR 1 CP 274 ***(foll)***
Lau Tin Sye v. Yusuf bin Muhammad [1973] 2 MLJ 186 ***(refd)***
Lee Lau & Son Sons Realty Sdn. Bhd. v. Tan Yah & Ors. [1983] 2 MLJ 51 ***(refd)***
Nippon Yusen Kaisha v. M A Balch [1954] MLJ 53 ***(refd)***
London Graving Dock Co. Ltd. v. Horton [1951] AC 737 ***(refd)***
Sedleigh - Denfield v. O'Callagan & Ors. [1940] All ER (Annotated) 349 ***(cit)***
Teh Hwa Seong v. Chop Lim Chin Moh & Anor. [1981] 1 MLJ 341 ***(foll)***
Bowater v. Rowley Regis Corporation [1944] KB 476 ***(cit)***
Imperial Chemical Industries Ltd. v. Shatwell [1965] AC 656 ***(refd)***
Oli Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244 ***(refd)***
Dingle v. Associated Newspapers Ltd., [1961] 2 QB 162 ***(refd)***
Drinkwater v. Kimber [1932] 2 QB 281 ***(refd)***
Nani v. WG Williams [1986] 2 MLJ 68 ***(refd)***
Pang Ah Chee v. Cheng Kwee Seng [1985] 1 MLJ 153 ***(refd)***
British Transport Commission v. Gourley [1956] AC 185 ***(refd)***
Mariah bte Mohamed (suing as the Administratrix of the Estate of Wan Salleh bin Wan Ibrahim deceased) v. Abdullah bin Daud and Dr. Lim Kok Eng & Anor. [1990] 1 MLJ 240 ***(cit)***
Kathayanrayan v. Ng Sup Moi & Anor. [1987] 1 MLJ 246 ***(refd)***
Yee Hup Transport & Co. & Anor. v. Wong Kong [1967] 2 MLJ 93 ***(refd)***
Ong Ah Long v. Dr. A Underwood [1983] 2 MLJ 324 ***(refd)***
Pengarah Institute Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor. [1988] 1 MLJ 19 ***(cit)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 7(iv)(d), 7(3A), 8

Other sources referred to:
Halsbury's Laws of England 4th Edn., Vol. 34, para. 305

First Action
For the plaintiff - M.S. Sandhu; M/s. M.S. Sandhu & Co.
For the 1st defendant - Bernard Philip; State Attorney-General's Chambers, Sarawak.
For the 2nd defendant - Lili Puk; M/s. D.F. Abang Zen
For the 4th defendant - David Lim; M/s. Wan Ullok, Jugah, Chin & Co.

Second Action
For the plaintiff - Chin Yung Yett; M/s. Yong Wong & Chin
For the 1st defendant - Lili Puk; M/s. D.F. Abang Zen
For the 3rd defendant - David Lim; M/s. Wan Ullok, Jugah, Chin & Co.
For the 1st Third Party - Richard Poh; M/s. Poh & Co.
For the 2nd and 3rd third party - Bernard Philip; State Attorney-General's Chambers, Sarawak

JUDGMENT

Richard Malanjum J:

Introduction

There are two actions before me, namely suit no. MR 5 of 1993 (the first action) and suit No. MR 60 of 1992 (the second action). At the commencement of the hearing for the second action, learned Counsel for the plaintiff in that action applied to have the first action jointly heard. Learned Counsel for the defendants and third parties in the second action raised no objection to the application. And having considered the matter, in particular, the facts that both actions related to the same incidents and that there could be common parties and witnesses, I therefore ordered that the two actions should be jointly heard.

The Actions

In the first actions, the plaintiff is the administratrix of the estate of Jeffery Satuk Gabar, ("deceased"). And in her claim, the plaintiff prays for the following relief, (*verbatim*):

1) Damages under s. 7 of the Civil Law Act 1956 for the benefit of the dependents of the deceased.

2) Damages under s. 8 of the Civil Law Act for the benefit of the estate of the said deceased.

3) Interest on the said damages at such rate and for such period as the Court shall think just.

4) Such further or other relief as the Court may deem fit.

5) Costs.

And these relief are sought for arising from the averments of the plaintiff on the escape of gas, a dangerous thing, negligence, occupiers breach of duty of care and public nuisance.

Whereas in the second action, the plaintiff is suing in his own capacity and he prays for the following, (*verbatim*):

1. Special damages as aforesaid (RM244,206.72);
2. Damages;
3. Further and other relief;
4. Costs.

Similarly, in the second action the plaintiff alleges liability on the basis of the escape of gas, being a dangerous thing, negligence and public nuisance.

For the first action, only the 1st, 2nd and 4th defendents are involved as judgment had been entered against the 3rd defendant.

In respect of the second action the 2nd defendant was not served with the writ of summons as he was in New Zealand. Thus, only the 1st and 3rd defendants were before the Court. However, both the defendants brought in third parties, naming three third parties, to wit:

(i) Perunding Dayacipta (a firm), ("Perunding");

(ii) The Director, Public Works Department Sarawak ("the Director"); and

(iii) The Government of Sarawak ("the Government").

And for purposes of this judgment I shall also be referring the 1st defendants in the first action as "the Government".

In both the first and second actions, the defendants and the third parties dispute the claims. I shall therefore proceed to deal firstly with the issue of liability in respect of both the actions and should I find any liability I will then proceed to deal with the quantum of damages. But in view of the common incident upon which both these actions are based, perhaps I should outline at the outset the common undisputed facts.

The Common and Relevant Undisputed Facts

(i) That on 16 February 1990 at about 10 a.m. there was an explosion and fire in the premises ("the premises") occupied by the Public Bank Berhad, ("the Public Bank"), the 4th and 3rd defendant in the first and second actions respectively;

(ii) That the premises occupied two shop lots, Nos. 292 and 293 ("the shoplot No. 292 and Shoplot No. 293 respectively") which were registered in the names of the 2nd defendant ("Liew") and 3rd defendant ("Phua") respectively in the first action and as the 1st and 2nd defendants respectively in the second action;

(iii) That the Public Bank subleased the premises from Liew and Phua as from the 28 October 1988. A Draft Memorandum of Sublease was exhibited. (Exh. Pl p. 9);

(iv) That the Public Bank engaged a consultant, Perunding, to handle the renovations works in the premises and which commenced on 24 March 1989 and completed on 29 April 1989. However, gas supply was not included in the renovations plans and gas supply was not a subject to be considered before a certificate of fitness could be issued;

(v) That there was gas supply to shoplot No. 292. However, Liew applied to have the supply disconnected as from 1 November 1986. Thereafter no bill of charges was received;

(vi) That in shoplot No. 293 there was never any gas supply and was not in the list of accredited gas consumers;

(vii) That gas supply in Miri at all material time was under the care and management of the Government through the Public Works Department ("PWD");

(viii) That in 1988 PWD carried out gas metering exercise in Miri and shoplot No. 293 was connected to the metering system although it was not in the list of accredited gas consumers;

(ix) That 1 January 1990 and 5 February 1990 readings of the gas meter for shoplot No. 293 indicated high usage of gas;

(x) That the deceased in the first action came to the premises that morning of 16 February 1990 in connection with the reassignment of the insurance policy for his housing loan with the Public Bank. As a result of the explosion, the deceased was seriously injured and succumbed of his injuries in the evening of 16 February 1990 at about 8.20 p.m.; and

(xi) That the plaintiff in the second action was in the premises that morning of 16 February 1990 in order to see the Manager relating to his cheque.

The Liability Issue

Having heard and read the evidence as a whole (oral and documentary) and after considering the submissions of the learned Counsel for the respective parties, the question of liability, in my view, should be determined based on the following issues:

1. What was the cause of the accident, i.e. the explosion and fire, in the premises on 16 February 1990?

2. Was there any negligence involved in the accident?

3. Other basis of claims.

4. Specific defences as pleaded.

Issue 1

In respect of this Issue 1 I shall deal with the first and second actions together.

As to what caused the explosion and fire in the premises, there are two crucial testimonies, namely that of PW3, Khoo Ah Kow and DW5 Nicholos Patrick, which require particular consideration besides the others. And having perused and considered the evidence I am satisfied on a balance of probabilities that the explosion and fire on the 16 February 1990 was due to the ignition of an inflammable mixture of gas and air in the premises. And gas was present in the premises having leaked from the natural gas supplied by the Government through PWD. PW3 in this evidence and in his report (Exh. P2), stated that that was the case. In his report (Exh. P2) PW3 concluded thus:

Based on my overall examinations and findings, I am of the opinion that the damages to the bank had been caused by a gas explosion which was a result of the following:

(i) Gas had leaked into the bank through the floor in the manager's office and was trapped inside the bank.

(ii) Eventually, when the gas/air mixture reaches its explosive limit, any spark, e.g. electric sparks, or source of heat would ignite the mixture causing it to explode.

And having considered his qualification which was not challenged I accepted PW3 as an expert on the matter in which he was called to testify. Furthermore, DW5, though called by Government, testified that, (*verbatim*) "the probable cause of the explosion and fire was the gas and the gas could have come in from the natural gas supplied by JKR" (PWD). This witness was also the chairman of the Board of Inquiry ("the Board") set up after the accident. And the Board came up with findings and recommendations - Exh. P6A, Exh. P6B and Exh. P6C. I have also no reason to doubt the testimonies of the witnesses, in particular, PW3 and DW5. Incidentally, I find no submissions from the learned Counsel for the respective parties in these two actions offering other explanations as to the cause of the accident.

Issue 2

To determine this Issue 2 the following elements should be considered, namely:

i) Who caused the accident?

ii) Was there any duty of care?

iii) Was there any breach of that duty of care?

iv) any consequential damages as a result?

I will deal first with the law on negligence.

Briefly, negligence may be explained as a tort involving the breach of a legal duty to take care resulting in damage, undesired by the defendant, to the plaintiff.

In the oft-quoted case of *Donoghue v. Stevenson* [1932] AC 562 at p. 580, Lord Atkin made a generalised exposition of the law when he said:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in the law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

And in *Caswell v. Powell, Etc. Collieries Ltd.* [1939] 3 All ER 722 Lord Atkin went on to highlight one matter in considering the issue of negligence when he said, at p. 730:

> ... And whether you ask whose negligence was reasonable for the injury, or from whose negligence did the injury result, or adopt any other phrases you please, you must in the ultimate analysis be asking who "caused" the injury: and you must not be deterred because the word "cause" has in philosophy given rise to embarrassments which in this connection should not affect the Judge.

Of course in the context of the present cases the relevant question should be: who has or were responsible for the cause which inflicted the injury suffered by the plaintiffs?

In this speech in the same case, Lord Wright reiterated the elements of negligence when he said this at p. 737:

> Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury, or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man ... It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins.

Recently, in *Page v. Smith* [1995] 2 All ER 736 at p. 739g. Lord Keith of Kinkel expressed his view that:

> Liability for negligence depends upon proof both that it was reasonably foreseeable that injury would result from the act or omissions called in question and that a relationship of proximity existed between plaintiff and defendant. Where the plaintiff is personally involved in a terrifying incident proof of proximity presents no problem. Where, however, the plaintiff is what may be described as a secondary victim proximity may be very difficult to establish.

And in the same case Lord Lloyd of Berwick at p. 760j stated that:

> The test in every case ought to be whether the defendant can reasonably forsee that his conduct will expose the plaintiff to risk of personal injury. If so, then he comes under a duty of care to that plaintiff.

Another matter which also requires consideration is where the articles involved are dangerous in themselves.

In *Dominion Natural Gas Co. v. Collins* [1908-10] All ER 61 PC the headnotes read:

> In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precautions imposed on those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precautions, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then the defendant will not be liable. Accordingly, where a gas company installed in a repair shop of a railway company a plant for the supply of gas and negligently fitted a safety valve with an emission into the shop instead of into the open air, and there was an explosion, on of the railway company's servants being killed and another injured,

Held: the gas company was liable to the dependants of the dead man and to the injured man in damages for negligence.

In that case the Privy Council upheld the initial findings of negligence on the part of the gas company, the defendant, whose servants were under duty from time to time to inspect the apparatus installed and to see that it was in good order. It was held that the defendant failed to show that the proximate cause of the accident was the conscious act of another volition.

With the foregoing principles of law in mind I now return to the actions at land. I will also proceed to deal with both actions together unless stated otherwise.

According to DW5 the standard adopted by PWD in the supply of gas in Miri prior to 1990 was that of acceptable standard as in countries like Singapore and Australia. It was a low-pressure system at the maximum pressure of 10 psi and on reaching users at only 0.3 psi to 0.5 psi. And the conclusion of the Board according to DW5 was that the gas leaked through the corroded gas pipe found in the premises which then seeped through under the ceramic floor and thereafter went through the trunking thereby being distributed into the different parts of the premises. I find that conclusion to be contrary to the finding of PW3. In his evidence PW3 said that from his examinations he found the leakage to come from the gas pipe and through the floor in the Manager's room of the premises. Anyway, I do not think it is crucial as to how the gas was distributed once in the premises. The pertinent questions to consider should be:

i) who supplied the gas?

ii) was the gas supply made on request, and if not why was it done? and

iii) was there any precautions taken before and after gas supply was connected?

In respect of the first question the answer can be found under Issue 1. That the gas was supplied by the Government through PWD. As regards the second question it was the evidence of PW3 that the corroded gas pipe was found in the Manager's room of the premises which happened to be on shoplot No. 293. And it is an undisputed fact that shoplot No. 293 was not in the list of accredited gas consumers and had never applied for gas supply. This was also the evidence of DW5. Hence, the supply of gas was not made on request by the owner of shoplot No. 293 or by the Public Bank. Yet gas was supplied. And even for shoplot No. 292 it was not challenged that as early as 1 November 1986 application to disconnect the gas supply was made and no bill of charges was received since then.

Now, DW5 testified that a gas pipe within a building would have been installed when the building was constructed. There appears to be no challenge to this statement. But that should not mean that gas would be automatically supplied. DW5, under cross-examination by the learned Counsel for the plaintiff in the first action admitted that there was a 1987 list of accredited gas consumers but it was not updated. This witness further admitted that even with the 1987 list, if it was followed, the explosion could have been prevented by not connecting the gas supply to shoplot No. 293 or to the premises. Unfortunately, according to DW5, it was not only that the 1987 list was not updated but it was also not followed during the exercise of meters installation in 1989. Hence, gas meter was installed for shoplot No. 293.

The evidence of DW5 appears to be in contradiction with that of PW8, Jeffery Philip. According to PW8 in 1989 he was doing the general supervision of the gas meter installation in Miri which included the premises. But the actual work was done by private contractors. And for the premises his subordinate, Chiew Kim Hua, was reporting to him on the gas meters installation. It was also his evidence that prior to the installation a list was given to him which included shoplot Nos. 292 and 293. And when he was challenged to produce that list, PW8 came back, after being allowed to stand down, with a list which he said was a 1989 list. However, this witness was quick to say that the list he had in Court was not the list that was given to him prior to the installation but was only the copy. I pause to note that I cannot see the connection of the list he showed in Court and the alleged list that was given to him prior to the gas meters installation. One reason is that PW8 admitted that the list that was given to him was undated. If that was the case then I could not find any reason to believe that the list he showed in Court which he said was a 1989 list was a copy of the undated list. Further, I found no explanation as to how PW8 could assume that the undated list was a 1989 list.

I could not also accept the evidence of PW8 pertaining to the alleged undated list because he testified that he did not personally verify whether the installation on shoplot Nos. 292 and 293 were proper and according to the list. This witness put the burden on his subordinate who has not called as a witness by any of the parties to these actions. But more important to note is that if PW8 was so sure about the inclusion of the two shoplots in the alleged list, then he should have no doubt about the propriety of the installation. Furthermore, the board, set up by PWD to conduct the investigation, came up with a different finding. It is inconceivable that the Board would not have considered all the available evidence, including that of PW8 who was interviewed, before making its findings.

As such I have no reason to disbelieve DW5 and the finding of the Board (see: Exh. 96A-C) that shoplot No. 293 was not in the 1987 list of accredited gas consumers and that it was never a gas user.

Accordingly, it is my finding of fact that in installing the gas meters in 1989 there was none or insufficient precaution taken by PWD to ensure that only accredited gas consumers were connected to the gas supply. In my view PWD was duty-bound to ensure that only those in the list of accredited gas consumers or who had applied for gas supply would be supplied with gas. That precaution was important to prevent non-consumers who might act or omit to act which gas consumers normally would or would not do. There was therefore an obvious breach of duty on the part of PWD.

Having installed the gas meters for the premises I find no evidence that steps were taken by PWD to ensure safety. In fact PW8 testified that he could not recall and as far as he knew the consumers were not told of the gas meters installations in their premises. Neither did he know of any test for leakage being carried out for shoplot Nos. 292 and 293 before the gas meters installation. And DW5 admitted that in 1989 there was no leak-detection test being carried out in the internal plumbing for all gas consumers including the premises. He added that Procedure v. (para. b, p. 18 of Exh. 6(a)) was not, (*verbatim*) 'strictly followed by whoever responsible'. The evidence of DW5 succeeded in nullifying the testimony of PW2, Datuk Micheal Parker, who said that before the explosion PWD did have checkings which was an on-going process. Obviously PW2 was only relating an ideal situation.

The least PWD could have done and was obliged to do was to inform the owners of shoplots Nos. 292 and 293 of the gas meters installation in view of the absence of requests on their part for any gas supply. By doing that the owners or the occupiers would have been put on notice and it would have probably prompted them to check on any leakage in the premises.

I have also noted that there was no evidence adduced by the Government to rebut the allegation that although there were high readings on the meter for shoplot No. 293 nothing was done. Nor was there any investigation being carried out by PWD for such high readings. And there was no challenge to the evidence of PW8 that the isolation values provided with the gas meters, including that of shoplot No. 293, could be easily switched on or off by anyone in order to let gas into the supply line of consumers. There was no other safety device adopted to prevent such tempering.

Accordingly, it is my finding on a balance of probabilities that in respect of both actions there was none or insufficient steps taken by PWD and thus the Government to ensure safety after the gas supply was connected to the premises. To my mind, PWD and thus the Government had a major role in permitting the accident through its acts and omissions. The inevitable conclusion could only be that there was a duty to take care on part of PWD and that duty was breached. And in my view it was reasonably foreseeable that consequential damage could happen. It was not disputed by the learned Counsel for the Government of the dangerous nature of gas.

Before coming to my finding I did consider the contentions of the learned Counsel for the Government on matters related to this Issue 2. Briefly, learned Counsel submitted as follows:

i) that there was no evidence to show that the Government (*verbatim*) "failed to construct, maintain and control its main pipes and meters and, after construction to keep the same so that gas could not escape therefrom" into the premises. Learned Counsel said that even after the accident, tests carried out showed the meters were functioning. And he also came up with another statement that "there is no evidence to show that the gas had escaped from the main pipes and meter of the 1st defendants into the Bank";

ii) that shoplots Nos. 292 and 293 were gas users before;

iii) that inspection of leakages was on-going exercise but did not reach the premises before the accident;

iv) that the maxim '*res ipsa loquitur*' does not apply as the cause of the accident is known;

v) that Liew and the Public Bank could not deny knowledge of gas supply to the premises as there was evidence to show that gas escaped from the corroded gas pipe on the ground floor of shoplot No. 293;

vi) that the gas pipe must have been interfered with during the renovation of the premises thereby exposing it and thus aggravating its corrosion;

vii) that the staff of the Public Bank smelt something but took no action;

viii) that the renovation of the premises was done without the approval of the Miri Municipal Council. Hence, no one altered the Public Bank on the position of the gas pipe; and

ix) that the safety valves were turn-off after the meters installation. However, anyone could have turned the valves on. The safety valves were of standard system used by other countries.

In respect of contention (i) above, I think learned Counsel for the Government missed the point. As stated hereinabove that the primary consideration should be the absence or the inadequate precaution taken thereby installing the gas meters and reconnecting the gas supply to the premises when there was no request to do so. That was not rebutted by way of evidence adduced.

And I have already stated my reason for preferring the evidence of DW5 on the 1987 list of accredited gas consumers. Thus, contention (ii) fails.

As for contention (iii) it only goes to show that the Government knew of its responsibility to check for leakages. Hence, it should not be heard now to say that it had nothing to do with the leakage of gas in the premises prior to the accident.

For contention (iv) I think there should be no dispute that it has no application in this case. Learned Counsel for the plaintiff in the first action even conceded on that point.

And for contention (v), evidence adduced indicated that PWD did not inform consumers even after installing the gas meters. Thus, the owners and the occupier of the premises could not be expected to know that gas supply was reconnected. And even after the high readings of the meter for shoplot No. 293, PWD made no investigation or at least a check with the occupier whether the consumption was justified.

As for contentions (vi), (vii) and (viii) I will deal with them later on this judgment. Finally, for contention (ix) it may be true to say that it was an accepted safety standard system. But the fact remains that such safety valves should not have been there in the first place if PWD was careful in executing its duty installing gas meters in 1989.

Consequently, gas, being a dangerous article as conceded by the learned Counsel for the Government, was allowed into the premises. And if it was mandatory for PWD to instal gas meters to all building in Miri as what PW8 seemed to say in his testimony, then it was only appropriate that before doing so checks for leakages should have been done. Unfortunately, in this case reconnection to the gas supply was done first. As DW5 testified that Procedure V was not strictly followed.

In respect of Liew, in both actions I find as a fact that he had no part in bringing or allowing the supply of gas into the premises. The undisputed fact favours him.

There was also no evidence adduced to show that Liew was under an obligations to ensure the safety of the gas supply in the premises under the memorandum of sublease with the Public Bank. And going by the evidence adduced the source of the leak was the corroded gas pipe in shoplot No. 293 and not in shoplot No. 292 The inevitable conclusion therefore is that Liew had no part in the cause of the accident or in causing the explosion and fire in the premises. With this conclusion, I am satisfied on a balance of probabilities that no blame should be levelled against Liew in both actions.

As for the Public Bank it is my finding based on the evidence adduced that it could not be held responsible for bringing or allowing the supply of gas into the premises. Similarly, there was no evidence adduced to show that the Public Bank had the knowledge of the gas supply when it look possession of the

premises. Hence, there was no basis for the contention of the learned Counsel for the plaintiff in the first action that the Public Bank or its employees or agents did not take precautions on the safety of the gas pipe when the renovations works were done. There was also no evidence adduced that the Public Bank knew of the existence of the gas pipe in the course of the renovation works. Thus, in my view it could not be expected to take steps at that point in time.

But I find merit in the argument that the Public Bank, through its employees, including the Branch Manager, failed to take steps after becoming aware of the unfamiliar smell in the premises. PW4, Marcell Usop @ Usop bin Pak, testified that prior to the accident, he smelt gas when he reported for work at 8.40 a.m. that morning of 16 February 1990. But this witness also said that as he smelt benzene it prompted him to ask the guard on duty if the motorcycles were parked inside the premises. The reply was in negative. That should have triggered him to check further. After all this witness testified that he spoke to his Branch Manager about the smell on the 15 February1990 but the latter did not do much except to use the air freshner in his room. Further, PW9 Wilson Ling Kuai Kwong corroborated PW4 when he said that he smelt something one month before the accident but he did not know what it was.

It is obvious from the evidence that none of the employees of the Public Bank did anything although the smell, whether it was benzene or something else, should have prompted them to investigate. There was no evidence adduced to explain the inaction of the employees. Thus, the omissions on the part of the Public Bank, through its staff, to a certain degree led to the happening of the accident. For that, it is my finding that some blame should be attributed to the Public Bank. As to what extent, I will deal with that later. And due to the nature of the business of the Public Bank it would have been reasonably foreseeable that its customers and members of the public having dealing with it would be in the premises during banking hours. And it was only reasonable that they expected the premises to be safe for its purpose. As such, the Public Bank owed a duty and should have taken all reasonable precautions to ensure their safety while in the premises. As its staff did not do anything even with the persistent smell and that according to PW4 he smelt gas, the Public Bank should therefore be held vicariously responsible for the breach of the aforesaid duty. The consequence of course was the accident whereby the deceased in the first action and the plaintiff in the second action suffered death and injuries respectively. And that consequences in my view were reasonably foreseeable bearing in mind the nature of gas. Thus, to that extent the contention (vii) of the learned Counsel for the Government has some basis.

The Public Bank contended through its learned Counsel that no blame should be put upon it as it relied on Perunding to do the renovation works in the premises. And that reliance was placed upon Perunding to do the works properly. Thus, it was argued that Perunding should have ensured that the

premises was a safe place of work. Learned Counsel also added that Perunding should also be liable for failing to remove or disconnect the existing gas pipes in the premises in breach of its duty of care to the staff and customers of the Public Bank. With respect, the submissions of the learned Counsel for the Public Bank can only be appreciated if evidence to that effect has been adduced before this Court. Unfortunately, not a shred of evidence was adduced to that effect. The witnesses called by the learned Counsel for the Public Bank, namely, DW6 Deputy Superintendent of Police Fauzie Saadi and DW7, Christie Lee Sook Jun, did not touch on the renovation works in the premises. In any event, I find the argument to be quite irrelevant in view of my finding hereinabove as to why the Public Bank should share the blame for the accident.

And if the intention is to associate Perunding with the blame, then with respect, I find no basis for the reasons as follows:

(i) The evidence of DW3, Norman Choo shows that the Miri Municipal Council (the local authority responsible for the approval of building plans and the issuance of occupation permits in the Miri Municipality) was never concerned with the gas supply to buildings. Indeed gas supply, according to DW3, has never been quoted in the check-list for building plans. Hence, there is no basis to say that by failing to get the approval for the renovation plans Perunding was at fault and in breach of its duty to take care.

And as for the evidence of DW2, Shafie bin Madom, I also find it irrelevant. This witness testified that the Town Planning section of the Land and Surveys, Miri was only involved on the land use aspect and not on the structure if it was only an internal renovation as was case here.

(ii) DW9, Sim Ching Yaw, who was engaged by perunding to do the renovations of the premises, testified that the only did the laying of Italian tiles on the floor of the premises. He also did the renovations of wall partition and the ceiling but he did not hack any part of the ground floor. And he did not see any pipe on the surface of the ground floor. Due to the uneven level of the ground floor, DW9 also said that he topped it up by adding another layer of cement above the existing floor.

Another witness, DW10, Wong Ping Huat, was called. He testified that he was the electrical contractor who was also engaged by Perunding for the renovation of the premises. According to him he did the electrical and telephone renovations. And for the telephone work it involved the placement of trunkings and junction boxes in accordance with the drawing plans supplied by Perunding. But PW10 maintained that the trunkings were laid on the existing concrete floor and thus the floor was not hacked. As for the concrete that covered the trunkings and junction boxes DW10 admitted that he did not do

it. And when he was further queried, DW10 explained that there was no need to dig into the existing floor as there was a difference of two inches in the floor level between shoplot Nos. 292 and 293 and the trunkings were only one inch thick. This witness also stated that he did not see any gas pipe in the premises nor did he know of the presence of gas pipes therein.

From these two witnesses, DW9 and DW10, I find no evidence indicating that Perunding, through its contractors, did not do the works properly or that the contractors meddled with the gas pipes in the premises. And there was also no evidence from the other witnesses, particularly PW3, that indeed the original floor was hacked, especially around the area where the corroded gas pipe was found. Hence, there is nothing in the evidence adduced in support of the contentions of the Public Bank against Perunding. As such I find no blame should be attached to perunding in so far as this Issue 2 is concerned. With this finding the contentions (vi) and (viii) of the learned Counsel for the Government also fail.

As for the claim by the Public Bank against the director and the Government in the second action my earlier findings against the Government in the first action stand. Thus, I am satisfied on a balance of probabilities that the Public Bank has established its averment as contained in para. 8 of the statement of claim against the Director (2nd third party) and the Government (3rd third party)

As for Liew, in view of my earlier findings, there is therefore no necessity for me to deal with his claim against the Director and the Government.

In respect of the consequences of the accident it is an agreed fact that the deceased in the first action was injured and thereafter passed away as a result of the explosion and fire in the premises. As for the plaintiff in the second action, I find on the evidence adduced that he also sustained his injuries due to the explosion and fire. No evidence was adduced by the defendants or the third parties in the second action which rebutted the averment of the plaintiff as to the cause of his injuries.

Accordingly, I am satisfied that the consequences of the explosion and fire in the premises as pleaded by the plaintiffs in the first and second actions respectively have been duly established on a balance of probabilities.

In view of my findings hereinabove, on a balance of probabilities, I find that the plaintiff in the first action has established negligence as pleaded in para. 7, particulars - (b) to (i) and particular (g) of the statement of claim against the Government and the Public Bank respectively. Gas, being a dangerous article, the Government and the Public Bank owed a duty of care to those in the position or class of the deceased at the material time. (See: *Dominion Natural Gas Co.* (*supra*)). And it was due to the breach of that duty, through the acts and omissions as discussed hereinabove, that led to the

explosion and fire in the premises thereby causing injuries and death to the deceased. It was reasonably foreseeable that injuries would result to other persons or properties in the event of such breach of duty. The premises, being a bank and accessable to customers in particular and to the public in general, it was reasonably foreseeable that customers and members of the public might be present especially during the banking hours.

Similarly, I am also satisfied on a balance of probabilities that the plaintiff in the second action has proved his case on the plea of negligence against the Public Bank as particularised in item 3 of para. 6 of his statement of claim. And as the Public Bank has brought in as third parties the Director and Government and in view of my findings on PWD and thus the Government in the First Action, the claim of the Public Bank against them as pleaded in para. 8 of the statement of claim against 2nd and 3rd third parties has also been established on a balance of probabilities.

Issue 3

Besides negligence as the basis of her claim, the plaintiff in the first action also pleaded the following:

(i) Breach of duty of care on the part of the Public Bank as an occupier;

(ii) Escape of gas, a dangerous thing; and

(iii) Public nuisance.

As for the plaintiff in the second action he also founded his claim for relief on;

(a) Escape of gas, a dangerous thing; and

(b) Public nuisance.

However, in his final submissions learned Counsel for the plaintiff in the first action did not pursue on the issues of escape of gas and public nuisance. Hence, I shall only deal with the issue of whether the Public Bank as the occupier of the premises was in breach of duty of care towards the deceased as pleaded in para. 8 of the reamended statement of claim.

It was not in dispute that the Public Bank was the occupier of the premises. But the Public Bank contended that it had taken all reasonable care to ensure the safety of its visitors or customers by employing a consultant to oversee the renovations of the premises. Further, it was also stated in its defence that at all material times the gas in the premises was invisible and odourless, thus undetectable by ordinary reasonable means.

But before making any finding of liability as an occupier it must be determined whether the deceased was an invitee or lawfully in the premises at the material time. There was no challenge to the reason for the deceased to be in the premises that morning. Thus, he was in fact a customer of the Public Bank. He was in the premises for a business purpose of material benefit to the occupier, the Public Bank. There was infact a common interest between the deceased and the Public Bank. Accordingly, the deceased could not be described as anything else but "invitee" under common law.

As an invitee, was there a duty owed to the deceased by the Public Bank as the occupier?

In *Indermaur v. Dames* [1886] LR 1 CP 274 Willes J stated the duty owed in the following terms:

And with respect to such a visitor at least, we consider it is settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damages for unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact ...

Under the English common law which applies in Malaysia, an occupier is therefore under a duty to prevent damage or injury to an invitee or visitor due to unusual dangers on the premises which he knows or ought to know and which the invitee or visitor does not know about.

The statement of the law in *Indermaur v. Dames* (*supra*) has been consistently applied or referred to by the Courts of this country. (see: *Lau Tin Sye v. Yusuf bin Muhammad* [1973] 2 MLJ 186; *Lee Lau & Son Sons Realty Sdn. Bhd. v. Tan Yah & Ors.* [1983] 2 MLJ 51; *Nippon Yusen Kaisha v. M A Balch* [1954] MLJ 53.

And as to the onus in proving unusual danger his Lordship Seah FJ in *Lee Lau & Sons Realty Sdn. Bhd.* (*supra*) at p. 54 said this:

The onus of pleading and proving "unusual" danger which the appellants (defendants/occupiers) knew or ought to have known, rests on the respondents (plaintiffs) and since they had failed to establish it, the appellants owed no duty of care to the deceased.

In respect of the meaning of "unusual risk" Seah FJ in the same case quoting *London Graving Dock Co. Ltd. v. Horton* [1951] AC 7 37 said "that an 'unusual' risk is one which is not usually found in carrying out the task which the invitee has in hand."

In the present case the premises was used for banking business. Surely no customer would expect to find gas, an admitted dangerous thing, in such a place. Thus, the danger was unusual to the deceased and unknown to him at that material time.

But did the Public Bank know or ought to have known of the danger? It would appear to be so. The Public Bank, through it staff members, ought to have known of the danger. PW4 gave evidence that he smelt gas that morning of 16 February 1990 when he reported for work. But nothing much was done. And the fact that PW4 smelt something demolished the contention of the Public Bank that the gas at all material times was odourless. Indeed, PW9 said that he smelt something as early as one month before the accident. But no one bothered to investigate or call the authorities to do so. In short, nothing was done other than for the Branch Manager to use air freshner in his room. No doubt at that time there was no reported accident due to gas in Miri. And the state of knowledge at that time should be considered in determining whether the staff of the Public Bank ought to have known of the danger. But it should be a common knowledge then that gas was piped to the kitchens in Miri and thus inflammable. After all PW2 gave evidence that gas supply in Miri was started by Shell and handed over to PWD in the 1950s. Hence, it was not something extra-ordinary and unknown as to the nature of gas at that time. Accordingly, due to the lack of any action taken by the staff of the Public Bank even with the smell prevailing for about a month, I find therefore that the Public Bank through its staff did not take any reasonable or any reasonably sufficient measure to meet its duty as the occupier towards the deceased, an invitee. I am therefore satisfied on a balance of probabilities that the plaintiff in this first action has established para. 8(h) of the reamended statement of claim and thereby the liability of the Public Bank being the occupier of the premises. Of course this finding may also be taken as the alternative in the even that I was wrong in my earlier finding of negligence on the part of the Public Bank.

In respect of the second action I will deal first with the escape of gas. In para. 5 of his statement of claim, the plaintiff stated, *inter alia*, that (verbatim) "gas is a dangerous thing and the defendants (Liew, Phua and the Public Bank) are liable to the plaintiff for the aforesaid damages caused by the escape of the gas ....". It is to be noted that neither PWD nor the Government was made a party. And in view of my finding as to how the gas was brought into the premises, I do not think there is any basis for this particular averment. There was not a shred of evidence that it was the defendants who collected and kept the dangerous thing. Furthermore, I also find no evidence adduced by the plaintiff that the defendants or any of them, while knowingly or ought to have known, acted or omitted to act thereby allowing the escape of the gas. Thus, this particular cause of action of the plaintiff fails as against all the defendants in this second action.

By para. 7 of his statement of claim the plaintiff also pleaded that (*verbatim*) "the defendants their tenants agents or servants failed to construct their pipes in the said building and the bank and after construction failed so to keep the same that gas in dangerous quantities would not escape therefrom and thereby maintained a public nuisance ..."

I pause to note that the plaintiff founded his cause of action on public nuisance. And public nuisance is "one which inflicts damage, injury or inconvenience on all ... or on all members of a class who come within the sphere or neighbourhood of its operation. However, it may affect some to a greater extent than others. The question whether the number of persons affected is sufficient to constitute a class is one of fact." *Halsbury's Laws of England* 4th Edn., Vol. 34, para. 305. And commonly, a public nuisance is a crime. But if any person who has suffered special damages over and above that suffered by the rest of the public due to the public nuisance, that person can sue in respect of it.

For the present case I am not satisfied that the allegations made thereof have been proved by the plaintiff. Firstly, on the basis of my finding as to the circumstances of the gas coming into the premises I do not think there should be any question of the defendents being expected to do as averred by the plaintiff. As such there is no issue that the defendants or any of them created or continued a public nuisance. Secondly, there was no evidence adduced that the public were affected generally and that the plaintiff suffered special damage arising therefrom. In *Sedleigh - Denfield v. O'Callagan & Ors.* [1940] All ER (Annotated) 349 at p. 365 Lord Wright said:

> Though the rule has not been laid down by this House, it has, I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable, a further condition is necessary namely, that he had knowledge, or means of knowledge, that he knew, or should have known, of the nuisance in time to correct it and obviate its mischievous effects.

And further down his Lordship went on to say:

> The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the management of his property, he should have realised the risk of its existence. This principle was affirmed in *Barker v. Herbert* [1911] 2 KB 633. That was the case of a public nuisance constituted by a defective railing dividing the area of the defendant's house from the highway. A boy, playing, fell and was injured, and claimed damages. Though the nuisance was a public nuisance, and though a public nuisance, in many respects differs, or may differ, from a private nuisance, yet there is, in my opinion, no difference, in the respect here material, which is that, he must, if he is to be held responsible, have

continued it, which I think means simply neglected to remedy it when he became, or should have become, aware of it.

On the facts of the present case I do not think therefore that the plaintiff has shown or satisfied on a balance of probabilities of the elements stated in the afore-mentioned case. There was no reason for the defendants, in particular, the Public Bank, to ensure the good condition of the gas pipes when there was no request for the supply of natural gas. Hence, this cause of action of the plaintiff in this second action also fails.

Finally, I make no finding on occupier's liability in this second action as that was not pleaded.

Issue 4

In the first action, it appears that only the Government pleaded a specific defence as contained in para. 7 of the reamended defence. Briefly, the defence is that the on-line isolation ball valve was tempered with by person or persons unknown and unauthorised by the Government. I have already dealt with this point earlier on in this Judgement whereby I found it to be without merit. But to add to what I have stated hereinabove, I must say that I found no evidence adduced by the Government to establish that plea. No one was called to testify that indeed the on-line isolation ball valves for the premises were closed after the installation. And of course nobody showed any evidence of tempering. Further, it is also contrary to common sense if the averment of the Government is to prevail. It may mean that no liability can ever be attributed to anyone who knows an article to be dangerous yet leaves it where any third party can have access. Surely common sense dictates that in such a situation reasonable precaution should be taken to prevent access to any stranger. Sadly, it is obvious to me that the Government, through PWD took no such precaution at any time before the accident.

Thus, I find no merit in the defence as pleaded in para. 7 of the reamended defence of the Government. And as the same defence was raised by the Director and the Government in their defences against the claim of the Public Bank in the second action I should therefore maintain the same conclusion.

In respect of the second action the Public Bank by para. 10c of its reamended defence pleaded that the maxim '*volenti non fit injuria*' should apply against the plaintiff. The same plea was also adopted by Liew. However, as I do not find any blame on him my consideration will only be confined to the Public Bank.

It was the contention of the learned Counsel for the Public Bank that as against the plaintiff in this second action the maxim should prevail for the following reasons:

(i) The plaintiff admitted to be aware of the presence of gas outside the premises when he visited the Public Bank on the 30 January1989. But he did not inform anyone when he was morally obliged to do so being an engineer and a councillor;

(ii) that the plaintiff also admitted smelling gas when he went into the premises that morning of the accident. Yet he did not warn anyone of the imminent danger which he knew; and

(iii) that knowing the hazard that morning plaintiff waited for the Manager inside the premises. His main concern was to sign his cheque and to leave as soon as possible. By so doing the plaintiff impliedly consented to the risk and that he assumed the risk.

Obviously, from the submissions of the learned Counsel for the Public Bank, he seems to portray that the maxim can be applied in an ordinary situation. But it was held in *Teh Hwa Seong v. Chop Lim Chin Moh & Anor. [1981]* 1 MLJ 341 that "to succeed in raising such a defence the defendants had to prove that the plaintiff had voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agrees to incur it." (per Yusof Abdul Rashid J). And in *Bowater v. Rowley Regis Corporation* [1944] K.B. 476 at p. 479 Scott LJ said that:

> a man cannot be said to be truly 'willing' unless he is in a position to choose freely and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will.

This foregoing passage was cited with approval by Lord Hodson in *Imperial Chemical Industries Ltd. v. Shatwell* [1965] AC (656). Hence, the basic element is that the consent must have been freely given.

Learned Counsel for the Public Bank also appears to think that consent to physical risk should be sufficient for the defence to succeed. But opinions have also been expressed by learned authors in law that consent should not be simply on the physical risk but to the legal risk, that is, the risk of actual damage for which there will be no redress at law. Such a situation may arise where a plaintiff has contracted to bear a particular risk himself. I am inclined to think that that should be the law.

Accordingly, the defence as pleaded fails for the reasons above-stated.

I. Conclusion on Liability

For the above reasons it is in my judgment that for the first action the Government and the Public Bank are liable for negligence. Further or in event that my finding against the Public Bank on negligence is wrong, I also find the Public Bank liable for having breached its common law duty as the occupier of the premises.

In respect of the second action my conclusion is that the Public Bank is liable for negligence. And as the Director and the Government were made third parties by the Public Bank it is also my finding that the Public Bank succeeded in its claim against them.

But that is not the end of the matter. In view of my earlier finding that the blame on the parties liable could not be equal, I must now apportion the liability.

Bearing in mind the events leading to the accident, inter alia, the negligent act of PWD in reconnecting gas supply into the premises in the absence of any request and while not being an accredited gas consumer, in my judgment the Government, being vicariously liable for the negligence of PWD and/or the Director, should be 90% of the blame. The remaining 10% of the blame should be borne by the Public Bank for negligence and/or for the breach of its common law duty as the occupier of the premises. That of course is the position in respect of the first action where the Government and the Public Bank are the defendants.

In the second action, the Public Bank was made a defendant but not the Government which was only brought in as a third party. Should the 10% liability be the basis as between the Public Bank and the Government, including the Director? Learned Counsel for the relevant parties did not address their minds on this point in their submissions. Anyway, the authorities seem to state "if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damages, each tortfeasor is liable for the whole damage", per Choor Singh J in *Oli Mohamed v. Keith Murphy & Anor.* [1969] 2 MLJ 244 at p. 245 with references to *Dingle v. Associated Newspapers Ltd.,* [1961] 2 QB 162 and *Drinkwater v. Kimber* [1932] 2 QB 281.

In view of the apportionment of the liability amongst the parties liable in both actions, the quantum of damages should be apportioned in that manner accordingly.

J. The Quantum

(1) The First Action:

There appears to be not much dispute on the evidence adduced relevant to the issue of quantum. At the time of the accident the deceased was 37 years old and was a Senior Foreman with Shell Sarawak Berhad. He was receiving a basic salary of RM2,738 per month and a monthly allowance of RM450 in addition, the deceased was entitled to annual Bonus of 2 months of the basic salary. This was what PW10, Mr. Gerawat Jala said in his evidence and which was not contradicted by the Government or the Public Bank. A subsidised interest on housing loan was another entitlement whereby the deceased was only to pay 3% per annum of the interest with the balance being paid by his

employer. Thus, with the salary, allowance and the bonus added the average monthly income of the deceased at the time of his death was RM3,644.33.

The testimony of PW11, the plaintiff was not challenged by the Government and the Public Bank. This witness testified that the dependents of the deceased at the time of his death were herself, the 4 children of the marriage and the elderly parents of the deceased. And to up-keep the family she required RM2,400 per month at that time. For his parents PW11 said that the deceased gave them a monthly sum of RM500/-. There was also no dispute that the deceased was a non-smoker and a non-drinker and thus he required only about RM10 per day for himself.

(a) General damages for loss of dependency:

In his submission learned Counsel for the Plaintiff in this first action stated that the multiplier should be on the basis of s. 7(iv)(d) of the Civil Law Act 1956 ("the 1956 Act") and thus, it should be: $\frac{55\text{-}37}{2} = 9$.

There was no challenge to this computation by the learned Counsel for the Government and the Public Bank.

As for the multiplicand, learned Counsel for the plaintiff calculated it to be RM2,900. And he arrived at that figure after deducting 20% for living expenses of the deceased from average monthly income at the time of death. Hence, the figure of RM313,200 was submitted as the general damages for loss of dependency calculated on RM2,900 x 12 x 9.

On the other hand, learned Counsel for the Government submitted that the gross income per month of the deceased should be RM3,140,00 from which income tax of RM447.00, dental charges of RM56.00 service charge of RM80 and personal expenses of RM270.00 should be deducted. And he came up with a figure of RM2,287 as the appropriate multiplicand.

Meanwhile, learned Counsel for the Public Bank made no submission on the general damages for loss or dependency.

In view of the undisputed facts I should only now consider the appropriate multiplicand. Firstly, the gross monthly earning of the deceased as stated by the learned Counsel for the Government omitted the fact that the deceased was entitled to an annual bonus of 2 months of the basic salary. That figure should be added. But the average monthly income must take into account the taxes payable. (see: *Nani v. WG Williams* [1986] 2 MLJ 68). From the last salary slip of the deceased (Exh. P1 p. 137) the monthly tax deduction was RM447. Further, the personal expenses and costs of earning the income of the deceased should be deducted. In this case learned Counsel for the plaintiff submitted that it should be 20% and which I agree. Thus, the computation should be as follows:

a Total monthly income is RM2,738 + RM450 = RM3,180

Deduct income tax	: RM447
Deduct personal expenses	
b and costs of earning	: RM600
(about 20% of RM3180)	
Balance	: RM2,133 per month
And per year will be	: RM2,133x12
c	= RM25,596
Add 2 months bonus less	
income tax	: RM4,582
d [RM 5,476 - RM894 (tax)]	
So net income per year is	: RM25,596 + RM4,582
	= RM30,178
And the average monthly	
e income is	: RM2,514.83
(RM30,178 ÷ 12)	

Thus, the multiplicand should be RM2,500 to round up the figure.

f And therefore the total general damages for loss of dependency should be:

RM2,500 x 12 x 9 = RM270,000.

g However, I should deduct for contingencies, other vicissitudes of life and accelerated payment a sum equivalent to 1/3 thereof thereby leaving the balance payable in the sum of RM180,000.

h I did not take into account the other charges as shown in the last salary slip of the deceased since there was no evidence that those charges where monthly in nature. And for the same reason I did not include the other allowances which were shown therein and the off-shore allowances of the deceased.

As for the apportionment of the sum awarded as general damages for loss of dependency, I think the fair percentage should be as follows:

i (i) The wife, Takong Tabari

@ Takung Tabari, aged 40 years and

now remarried 20 %

(ii) Joyce Jeffrey Satuk, aged 16 years	15 %
(iii) Martina Jeffrey, aged 15 years	15 %
(iv) Joffey Jeffrey, aged 13 years	20 %
(v) Joice Jeffrey Satuk, aged 10 years	20 %
(vi) Tama Gabar, aged 65 years	5 %
(vii) Sinah Gabar, aged 65 years	5 %

(b) Damages for bereavement :

The sum of RM10,000 as damages for bereavement should be payable to the wife of the deceased pursuant to s. 7 (3A) of the 1956 Act.

(c) Special Damages :

Learned Counsel for the Plaintiff did not pursue the other claims under special damages except for the funeral expenses and loss of interest subsidy on the housing loan.

For the funeral expenses no evidence was adduced as to the exact sum spent. However, this Court should be allowed to consider a figure as it could not be denied that expenses would have been incurred. (see: *Pang Ah Chee v. Cheng Kwee Seng* [1985] 1 MLJ 153). Hence, the sum of RM3,000 as submitted by the learned Counsel for the plaintiff is not excessive and I allow it.

In respect of the loss of interest subsidy on housing loan I find no evidence adduced indicating that indeed an actual loss has been suffered by the plaintiff or the estate of the deceased. It was not in dispute that there was an existing loan of the deceased at that time with the standard Chartered Bank. And it was for the purpose of re assigning the insurance policy to his housing loan with the public bank that he was in the premises that morning. Hence, it is fair to say that there must have been an existing insurance policy related to the housing loan with the Standard Chartered Bank. Nothing was shown as to what happened to that insurance policy. If payment was actually made from the policy then in my view there should be no question of any loss of interest subsidy on the housing loan. Although this Court should not speculate, the fact remains that I am not satisfied that this head of claim under special damages has been established. As such I disallow it. As was said by Lord Goddard in *British Transport Commission v. Gourley* [1956] AC 185 at p. 205 that "in an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved".

(d) Damages to estate of deceased under s. 8 of the 1956 Act:

The Government and the Public Bank posed no challenge to the testimony of PW11, the plaintiff, as to the condition of the deceased after the accident. Thus, it was not in dispute that the deceased died 10½ hours after the incident which happened at about 10 a.m. and the deceased passed away at about 8.30 p.m. on the same day. According to PW11 the deceased was in great pain prior to his death and fully conscious as he could relate to her what actually happened that morning.

Now, the amendments to the 1956 Act did not alter the right of the estate of a deceased person to claim damages for pain and suffering if death was not instantaneous and that the deceased person was conscious prior to his death (see: *Mariah bte Mohamed (suing as the Administratrix of the Estate of Wan Salleh bin Wan Ibrahim deceased) v. Abdullah bin Daud and Dr. Lim Kok Eng & Anor.* [1990] 1 MLJ 240).

Thus, in the present case the claim of the plaintiff is not without basis in view of the evidence before the Court. But due to the short period to death I do not think the claim for RM10,000 can be supported. In *Mariah bte Mohamed* case (*supra*) the award for pain and suffering prior to death was RM1,500. And the period before death was 5 months and 18 days. Thus, the sum of RM3,000 for pain and suffering in this case should be adequate.

In summary therefore the awards are as follows:

(a) General damages for loss of dependency RM180,000

(To be apportioned as stated above and that the sums allotted to the children under the age of majority shall be paid to the Public Trustee in trust for them pending attainment of the age of majority in each case but with liberty to apply for their expenses as and when necessary.) RM180,000

(b) Damages for bereavement : RM10,000

(c) Special Damages

(i) Funeral Expenses : RM3,000

(d) Damages to estate under s. 8 of the 1956 Act (pain and Suffering) : RM3,000

(e) Interest at the rate of 3% p.a. on the special damages from the date of accident to the date of trial (*Nani's* case (*supra*);

(f) Interest at the rate of 8% p.a. on the judgment debt from the date of judgment until realisation; and

(g) Costs to the plaintiff to be paid by the Government and the Public Bank.

As indicated above that I find the degree of blame as between the Government and the Public Bank to be in the ratio of 90:10 and hence the same ratio should apply in respect of the quantum. (See: *Kathayanrayan v. Ng Sup Moi & Anor*. [1987] 1 MLJ 246).

And since no liability is found against Liew I award him costs to be taxed in the exercise of my discretion.

(2) The second Action:

The plaintiff (PW12) in this second action gave evidence pertaining to the extent of this injuries which was 36% - 37% of 2nd and 3rd degrees burns and multi-laceration. He also testified about the pain he suffered and the several operations he underwent for skin graft. To highlight the disfigurement on his body the plaintiff tendered photographs of himself (Exh. P10, p. 80-84) and also showed to the Court scars on his hands and fingers. Receipts and bills for his medical expenses were also tendered (Exh. P11A and Exh. P11B). And according to the plaintiff his doctor told him that he would require two further operations. No challenge was made to this portion of the evidence of the plaintiff.

As for his claim for pre-trial loss of earnings the plaintiff submitted the salary scale of the Association of Consulting Engineers, Malaysia (Exh. p10) p. 70-74) and his Income Tax Year of Assessment 1990 (1989 income) (Exh. P10 p. 75) upon which he said that his daily average earning during that period was in the sum of RM250. And his medical leave from the date of the

accident to the date of commencement of this action came up to 505 days. Whereas from 1 May 1991 to 31 July 1991 the plaintiff said that he was medically advised to do light work and therefore he should be entitled to claim half of what he claimed to be his daily earning of RM250.

In challenging the claim of loss of earnings, learned Counsel for the Public Bank contended that the plaintiff must show evidence of actual loss. The case of *Yee Hup Transport & Co. & Anor. v. Wong Kong* [1967] 2 MLJ 93 was cited where at p. 94 his Lordship Ong Hock Thye FJ said that:

> The real question was whether he was in any way less capable of going about his normal occupation. If so, then and then only, would arise the assessment of the pecuniary loss resulting therefrom. Loss of earning capacity is a horse of a different colour from loss of amenity.

And in that case the actual loss of earnings was reduced from RM8,400 to RM2,200.

It was also submitted by the learned Counsel for the Public Bank that the arbitrary figure of RM250 as the loss per day should not be accepted as the actual loss. After all, learned Counsel added, that the firm of the plaintiff in fact experienced increase in earnings for 1990 and 1991. But that was attributed by the plaintiff to the billings for works done previously.

In considering the actual loss of the plaintiff I bear in mind that neither the Public Bank nor the Government disputed the medical leave that was given to the plaintiff and the days he was medically advised to do light duty. Nevertheless, I pause to ask whether the plaintiff had actually lost earnings for that period. In his evidence he admitted that his earnings for 1990 was RM60,000 and for 1991 it was RM82,000. For his 1989 gross earnings it was RM81,653. Hence, there is no doubt that the plaintiff or his firm was earning in 1990 and 1991. It was also admitted by the plaintiff that he had assistants to help him. And the nature of his work as a civil engineer has been consultancy work which included drawing and advising on plans.

Thus, to agree to the suggestion of the plaintiff that he should be paid at the rate of RM250 per day for the period he was on medical leave would totally ignore the fact that his firm was earning during that period. Further, to do so would tantamount to enable the plaintiff to make a profit or to reward him instead of merely to compensate him as required under the law. In the case of *Ong Ah Long v. Dr. A Underwood* [1983] 2 MLJ 324 his Lordship Syed Agil Barakbah FJ said this at p. 334:

> It must be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so for as money can compensate.

It is also unfortunate that while saying that the earnings for 1990 and 1991 where for works previously done, the plaintiff failed to substantiate such an averment by way of actually producing the relevant documents or by calling witnesses who might have the knowledge of his financial affairs at that time. There was also no evidence adduced indicating that the firm of the plaintiff during those years secured no jobs or that they were available but were not secured due to the absence of the plaintiff. It was also not shown that if not for the medical leave of the plaintiff the fruits of his labour in 1990 and 1991 would have manifested in the form of high incomes in later years. I am not therefore satisfied on a balance of probabilities that the plaintiff had actual loss of RM250 per day during his medical leave. In my view the appropriate approach in this case should be to consider the trend of the earnings of the plaintiff from 1989 on-wards. That year the earning of the plaintiff after tax was RM72,693. For 1990 and 1991 I assume those figures were before tax as the plaintiff failed to produce his tax returns for those years. Thus, it appears to me that it is quite safe to say that the gross earnings of the plaintiff between 1989 and 1991 were in the region of RM80,000 per annum. But there is no doubt that there was a drop of income in 1990. Accordingly, after taking into account tax deduction a fair figure for the loss of earning during the medical leave of the plaintiff, inclusive of the period he was medically advised to do light work, should be in the sum of RM20,000.

The next item that was contested by the learned Counsel for the Public Bank was the claim for general damages.

The case of *Pengarah Institute Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor*. [1988] 1 MLJ 19 was cited to support the contention that the plaintiff in this second action should not expect to get a sum for general damages more than that was awarded in that case. For 65% 1st and 2nd degree burns over parts of face, body, thighs and both upper limbs, the plaintiff in that case was awarded RM80,000 for general damages. And that figure although maintained by the Supreme Court, was described as "a bit on the generous side".

Accordingly, for the present case, having considered that the plaintiff suffered 36% - 37% 2nd and 3rd degree burns the fair sum for general damages, in my view, should be RM50,000. In doing so I have taken into account the depreciating value of money when taking the award in the *Pengarah's* case *(supra)* as a guide.

I find no challenge to the other claims of the plaintiff from the Public Bank and the Government, being a third party. In any event, I am satisfied that the plaintiff has proved his claim for the medical expenses by the production of the receipts (Exh. P11A and 11B) which were not disputed by the opposing parties. As for the loss of clothing, shoes, watch and spectacles I think I can take judicial notice that those item must have been with the plaintiff when he

was injured in the accident. And I do not think that strict proof should be imposed upon the plaintiff on such items or their values. After all the total claim on those items is only RM400

To sum up, the damage to the plaintiff in this second action are as follows :

(a) General damages	RM 50,000
(b) Special damages	
(i) Loss of earnings	RM 20,000
(ii) Damage to clothing shoes, watch and spectacles	RM 400
(iii) Medical fees, hotel charges, taxifares in Singapore, airfares and incidental	RM124,152.10

I note that the public Bank had already paid the sum of RM36,973.25 for the medical expenses and other expenses for the plaintiff. I have not taken into account that payment in the summary of damages payable to the plaintiff and that sum (RM36,973.25) should not therefore be deducted from the summary of damages as given hereinabove.

It was mentioned by the plaintiff that he would require two more operations. Unfortunately, no indication was given as to how much those operations would cost him. As such I do not think it is proper for this Court to speculate a figure. Thus, I decline to give any sum for those future operations.

As stated hereinabove that although I found that Public Bank to be with 10% liability in negligence, it would have to meet the payment of the full quantum of damages as awarded and costs. Of course it will be entitled to seek for contributions from the Government which include the Director, since I have found the Public Bank to have proved its claim against the Government and the Director as third parties.

As for interest there shall be at the rate of 3% p.a. on the special damages from the date of accident to the date of trial and thereafter the statutory interest at the rate of 8% p.a. on the judgment debt from the date of judgment to realisation.

Finally, costs to the plaintiff as against the Public Bank to be taxed. And since the plaintiff fails in his claim against Liew costs is hereby awarded to Liew to be taxed. Perunding should also get its costs against the Public Bank to be

taxed as the latter failed in its claim against the former. Similarly, the Public Bank should get costs against the Government and the Director, to be taxed. I make the foregoing order on costs in the exercise of my discretion.

Reported by Gan Peng Chiang